

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011 MSPB 43**

Docket No. DC-0752-10-0580-I-1

**David Francis SanSoucie,
Appellant,**

v.

**Department of Agriculture,
Agency.**

March 22, 2011

Phillip R. Kete, Esquire, Washington, D.C., for the appellant.

Jacqueline McGuire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal of an alleged involuntary disability retirement for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d), VACATE the initial decision, and REMAND the appeal for adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was an Equal Employment Opportunity Specialist, GS-0260-13, in the Civil Rights Division, Natural Resources Conservation Service, in

Beltsville, Maryland. Initial Appeal File (IAF), Tab 1 at 1; IAF, Tab 10 at 6. On November 13, 2009, he sent an e-mail inquiry to an agency human resources specialist regarding the amount of the annuity he might receive if he were to retire from the agency on disability. IAF, Tab 10 at 28. The appellant's e-mail message stated that he was "very sick with [an] acute heart condition." *Id.*

¶3 The appellant applied for disability retirement on December 23, 2009. *Id.* at 23-24. His application stated that he suffered from the following medical conditions: "Deaf, 50, [a]cute [a]ortic [a]neurysm, [b]rain [t]umor, [h]igh [b]lood [p]ressure and borderline diabetes, lifetime medications for heart, tumor and depression." *Id.* at 23. The application stated that he had requested the following accommodation: "permanent reassignment outside of civil rights division to a different office and location closer to home," due to a hostile work environment. *Id.* The application further stated that the appellant became disabled in January 2008; that he was still in pay status, working without an accommodation; and that the agency had not been able to grant his accommodation request. *Id.* The record also included a determination by the agency's medical officer, dated January 8, 2010, recommending the approval of the appellant's application for disability retirement. *Id.* at 22.

¶4 The Office of Personnel Management (OPM) initially denied the appellant's application for disability retirement benefits, but later approved it on or about May 20, 2010. IAF, Tab 10 at 18. On June 2, 2010, the appellant filed this appeal alleging that his disability retirement was involuntary and also alleging various forms of discrimination, including disability discrimination. IAF, Tab 1. The appellant requested a hearing. *Id.* at 2.

¶5 The acknowledgment order informed the appellant that his appeal appeared to pertain to a voluntary action and the Board might not have jurisdiction. IAF, Tab 2 at 2. The administrative judge ordered the appellant to file evidence and argument to prove that his appeal was within the Board's jurisdiction. *Id.* In response, the appellant alleged that (1) his retirement resulted from duress, i.e.,

working conditions so intolerable that he had no alternative but to retire, and (2) the agency failed to accommodate his disability when he desired to continue working. IAF, Tab 3 at 7-9.

¶6 The appellant also submitted a sworn declaration to serve as evidence regarding his allegations, but specifically stated that he was not waiving a jurisdictional hearing.¹ *Id.* at 6, 10-15. In the appellant's sworn declaration, he averred that he was profoundly deaf, the agency had failed to accommodate his deafness, he began suffering from severe anxiety and depression in 2008, and he was diagnosed with hypertension and an aortic aneurysm around July 2009. *Id.* at 10-11. He averred that in September 2009, management stopped assigning him substantive work and did not tell him why. *Id.* at 11. This decision caused antagonism from colleagues, who were required to do the work that the appellant was not doing. *Id.* He averred that he experienced ongoing stress, and began to suffer severe chest pains in March 2010. *Id.* at 12. On his physician's advice, he requested reassignment to any position for which he was qualified in downtown Washington, D.C., that would allow him a shorter commute and remove him from his "stress-inducing chain of command." *Id.* He explained that he requested reassignment to a number of specific positions located in Washington, D.C., in 2009 and 2010, as well as reassignment to the position of 508 Compliance Coordinator in Colorado, but was told that the hiring managers "could not accept [him] for reassignment without the agreement of [his] managers." *Id.* at 12-13.

¹ In his jurisdictional statement, the appellant asserted that the acknowledgment order appeared to suggest that no jurisdictional hearing would be held, and instead, the administrative judge would decide the matter based on the responses to the order. IAF, Tab 3 at 4-6. The appellant argued that the order was inconsistent with *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006) ("[U]nder [5 U.S.C. §§ 7701](#) and 7512, once a claimant makes non-frivolous claims of Board jurisdiction, namely claims that, if proven, establish the Board's jurisdiction, then the claimant has a right to a hearing."). *Id.* at 5-6.

¶7 The appellant averred that in September 2009, the agency’s medical officer found that he was eligible for reasonable accommodation as a disabled employee and sent his line management his physician’s recommendation that the agency reassign him. *Id.* at 13. He further averred, “At no time did management attempt to engage me in an interactive process to determine my need for the accommodation or to identify possible alternatives to it.” *Id.* The appellant averred that by April 2010, his symptoms had become so severe that he could no longer safely commute from his home in Alexandria, Virginia, to his office in Beltsville, Maryland, and that he requested and was granted leave without pay under the Family and Medical Leave Act (FMLA). *Id.* at 10, 14.

¶8 The administrative judge issued a second jurisdictional order addressing the showing an appellant must make regarding involuntary disability retirement. IAF, Tab 5. The administrative judge specifically ordered the appellant to provide information regarding the positions to which he sought reassignment, as well as OPM’s basis for granting his application for disability retirement, and how assignment to the positions would have accommodated his medical conditions. *Id.* at 2.

¶9 In his response to the jurisdictional order, the appellant provided a table of positions to which he had requested reassignment between March 2008 and the time of the appeal. IAF, Tab 9 at 6. The appellant explained that he had applied for and, presumably, been granted disability retirement based on his aneurysm, as well as panic disorder, which had been exacerbated by his difficult commute and job conditions. *Id.* at 4-5. The appellant claimed that his physicians opined that “he could work without substantial danger to himself if he were reassigned to a job with an easier commute, productive work assignments, and non-hostile management.” *Id.* at 5.

¶10 The agency then moved for dismissal of the appeal for lack of jurisdiction. IAF, Tab 10 at 6-9. The agency argued that it did not have a record of the appellant’s requests for reassignment, but instead, explained that agency records

“confirm his voluntary application through the agency’s competitive staffing process” for several positions. *Id.* at 7. The agency affirmed that the appellant applied for management and program analyst positions in Washington, D.C., in 2009 and 2010, and had been considered for these jobs, but was not selected. *Id.* The agency stated that the appellant also applied for an employee relations position and a human capital planning position, but was not qualified for either position. *Id.* The agency further averred that the appellant “was given the opportunity to have his doctor answer questions related to his medical conditions as it [*sic*] pertains to the essential functions of his position in order to consider reasonable accommodations for him,” but he “did not provide any response to the Agency.” *Id.* at 8-9. The agency further pointed out that the appellant had voluntarily retired, and that his application for retirement “was initially denied but subsequently appealed by the Appellant himself” and granted.² *Id.* at 9; *see id.* at 18 (letter from OPM stating that the appellant’s application was approved “[a]s a result of the recent Merit Systems Protection Board proceedings”).

¶11 The administrative judge issued an initial decision based on the written record and dismissed the case for lack of jurisdiction. IAF, Tab 11, Initial Decision (ID). The administrative judge determined, based on the table of positions the appellant submitted, that he failed to make a non-frivolous allegation that his disability retirement was involuntary. ID at 5. The administrative judge stated that the relevant time frame for determining whether an accommodation existed that would have allowed him to continue working began on the date that the appellant informed the agency of his medical situation and his desire to continue working and ended on the date of his separation as a

² The record for the disability retirement appeal shows that OPM moved to dismiss the appeal because it had rescinded its final decision denying the appellant’s application after the appellant “submitted sufficient documentation to establish his entitlement to disability retirement benefits.” *SanSoucie v. Office of Personnel Management*, MSPB Docket No. DC-844E-10-0476-I-1 (Initial Decision, May 20, 2010).

retiree. *Id.* The administrative judge stated that the appellant did not allege that he approached a particular agency official with the authority to reassign him noncompetitively, told that person that he wished to continue working, and requested reassignment as an accommodation. *Id.* Instead, the administrative judge found, the appellant apparently first notified the agency of his medical condition in the November 13, 2009 e-mail message, and at that time, he requested information about disability retirement and did not state that he desired to continue working. ID at 6. The administrative judge found that the appellant's efforts to apply for positions under various vacancy announcements was not a request for an accommodation. ID at 5. The administrative judge further found that the appellant failed to explain how the serious medical conditions from which he suffered could have been accommodated had he been assigned to a job with an easier commute, productive work assignments, and non-hostile management. ID at 6. The administrative judge thus dismissed the appeal for lack of jurisdiction, finding that the appellant was not entitled to a jurisdictional hearing. ID at 7.

¶12 The appellant filed a petition for review. Petition for Review (PFR) File, Tab 6; *see also* PFR File, Tab 1. The agency has not filed a response.

ANALYSIS

¶13 In his petition for review, the appellant argues that he met the Board's jurisdictional requirements by making a non-frivolous allegation of jurisdiction. The appellant further argues that the administrative judge misstated the applicable legal standards both in the acknowledgment order and the initial decision.

¶14 The appellant argues that he made a non-frivolous allegation of jurisdiction and is thus entitled to a jurisdictional hearing. PFR File, Tab 6 at 32-34. An employee-initiated action, such as a retirement or resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction. *Hosozawa v. Department of*

Veterans Affairs, [113 M.S.P.R. 110](#), ¶ 5 (2010). An involuntary retirement, however, is equivalent to a forced removal and therefore is within the Board's jurisdiction. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1328 (Fed. Cir. 2006) (en banc). Generally, an appellant who claims that a retirement was involuntary may rebut the presumption of voluntariness in a variety of ways, for example, by showing that the retirement was the result of misinformation or deception by the agency, intolerable working conditions, or the unjustified threat of an adverse action.³ *Pariseau v. Department of the Air Force*, [113 M.S.P.R. 370](#), ¶ 11 (2010). The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)](#).

¶15 The Board has recognized that involuntary disability retirement cases are somewhat different from ordinary involuntary retirement cases. An appellant who alleges that his disability retirement was involuntary must establish the following:

- (1) that he indicated to the agency that he wished to continue working, but that his medical limitations required a modification of his work conditions or duties, i.e., accommodation;
- (2) there was a reasonable accommodation available during the period between the date on which he indicated to the agency that he had medical limitations but desired to continue working and the date that he was separated, that would have allowed the appellant to continue working; and
- (3) the agency unjustifiably failed to offer that accommodation.

Pariseau, [113 M.S.P.R. 370](#), ¶ 13; *see also Okleson v. U.S. Postal Service*, [90 M.S.P.R. 415](#), ¶ 8 (2001); *Nordhoff v. Department of the Navy*, [78 M.S.P.R. 88](#), 91 (1998), *aff'd*, 185 F.3d 886 (Fed. Cir. 1999) (Table). The agency's failure

³ The appellant argued jurisdiction on the basis of intolerable working conditions, as well as disability. He claimed that by failing to accommodate his medical conditions, including his deafness, the agency created an intolerable work environment from which he had no choice but to retire. IAF, Tab 3 at 8-9. Because the appellant retired on disability, the administrative judge appropriately applied the criteria for involuntary disability retirement.

to accommodate the appellant, standing alone, however, would not make his decision to retire involuntary. *Okleson*, [90 M.S.P.R. 415](#), ¶ 8. If accommodation was impossible, the appellant's disability retirement would not have been a constructive removal, and other theories of involuntariness cannot lead to a different conclusion. *Id.*, ¶ 7. The essence of other claims of involuntariness, including coercion, duress, and intolerable working conditions, is that the appellant had a choice between retiring and continuing to work, but was forced to choose retirement by improper acts of the agency. *Id.* If the appellant was unable to work because of a medical condition that cannot be accommodated, he had no choice as to whether to continue working.⁴ *Id.*

¶16 If an appellant makes a non-frivolous allegation casting doubt on the presumption of voluntariness, he is entitled to a hearing at which he must prove jurisdiction by preponderant evidence. *Garcia*, 437 F.3d at 1344. To meet the non-frivolous standard, an appellant need only plead allegations of fact that, if proven, could show jurisdiction. *Pariseau*, [113 M.S.P.R. 370](#), ¶ 14. Mere pro forma allegations, however, are insufficient to meet this standard. *Pariseau*, [113 M.S.P.R. 370](#), ¶ 14. In determining whether the appellant has made such an allegation, the administrative judge may consider the agency's documentary submissions. *Id.* To the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, however, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Id.* (citing *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994)). Under these standards, we find that the appellant made a non-frivolous

⁴ This standard is correct to determine the Board's jurisdiction in most involuntary disability retirement appeals. However, in unusual circumstances, we have applied the principles for determining jurisdiction in regular involuntary retirements. See *Hosford v. Office of Personnel Management*, [107 M.S.P.R. 418](#), ¶¶ 8-9 (2007) (finding the appellant's disability retirement was involuntary on the basis of misinformation.).

allegation of facts casting doubt on the presumption of voluntariness, and he is thus entitled to a hearing on the issue of jurisdiction.

The appellant non-frivolously alleged that he indicated to the agency that he wished to continue working, but that his medical limitations required a modification of his work conditions or duties.

¶17 In his sworn statement, the appellant alleged that he requested reassignment to any agency position in downtown Washington, D.C., that would both allow him to shorten his Alexandria-to-Beltsville commute and remove him from his “stress-inducing chain of command.” IAF, Tab 3 at 10-12. The appellant further alleged that in September 2009, the agency’s medical officer, O.I. Jacykewycz, M.D., found that he was eligible for reasonable accommodation as a disabled employee and sent to his line management his physician’s recommendation that he be reassigned. *Id.* at 13. The agency, however, explained that it had “no record of any requests by the appellant for reassignment outside the competitive process which he utilized.” IAF, Tab 10 at 7.

¶18 The administrative judge found that the appellant’s November 13, 2009 e-mail inquiry regarding disability retirement appeared to be the first indication that he was “very sick,” and that message does not state that he wished to continue working. ID at 6. The agency has not specifically disputed, however, the appellant’s assertion made under oath that, in September 2009, Dr. Jacykewycz found that he was eligible for and recommended reasonable accommodation. *See Aldridge v. Department of Agriculture*, [110 M.S.P.R. 21](#), ¶ 9 (2008) (sworn statements that are not rebutted are competent evidence of the matters asserted therein); IAF, Tab 3 at 13. The Enforcement Guidance from the Equal Employment Opportunity Commission (EEOC) states that a person other than the individual with a disability, including a health professional, may request a reasonable accommodation on behalf of the individual. EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, Question 2, <http://www.eeoc.gov/policy/docs/>

accommodation.html (hereinafter EEOC Enforcement Guidance). Accordingly, the appellant has non-frivolously alleged that he indicated to the agency that he wished to continue working, but his medical limitations required a modification of his work conditions or duties.

The appellant non-frivolously alleged that there was a reasonable accommodation available between the date on which he indicated to the agency that he had medical limitations, but desired to continue working, and the date that he was separated, that would have allowed him to continue working.

¶19 In his sworn statement, the appellant explained that he requested reassignment to a number of specific positions located in Washington, D.C., in 2009 and 2010, as well as reassignment to the position of 508 Compliance Coordinator in Colorado, and was told that the hiring managers “could not accept [him] for reassignment without the agreement of [his] managers.” IAF, Tab 3 at 12-13. The appellant provided a list of positions to which he had sought reassignment. IAF, Tab 9 at 6. In response, the agency argued that it was “not aware of the positions that the appellant allegedly requested reassignment to,” but “[a]gency records confirm his voluntary application through the agency’s competitive staffing process” for a group of positions listed in the agency’s response. IAF, Tab 10 at 7. The agency pointed out that the appellant was unqualified for some of the positions for which he applied. *Id.* The agency said that the appellant was considered for some of the other positions, and even rated “best qualified” for one position, but he was not selected. *Id.*

¶20 The administrative judge found the appellant’s jurisdictional allegations to be insufficient. ID at 5-6. The administrative judge reasoned that the appellant appeared to have applied for positions under various vacancy announcements, and that “[a]n application for a position announced as a vacancy is not a request for an accommodation.” ID at 5. The administrative judge also concluded that only one of the positions for which the appellant applied was available within the proper time frame, between the date of his e-mail inquiry regarding retirement, November 13, 2009, and his separation date, May 28, 2010. ID at 6; *see* IAF,

Tab 1 at 3; IAF, Tab 10 at 27-28. The available position was as a 508 Compliance Coordinator in Colorado. ID at 6; *see* IAF, Tab 9 at 6. The administrative judge determined that the agency would not have been required to offer that position to him as a reasonable accommodation because it was outside of the appellant's commuting area. ID at 6.

¶21 However, as the appellant correctly contends on review, *see* PFR File, Tab 6 at 27-28, an agency's reassignment obligation is not limited by geographical location, *Gonzalez-Acosta v. Department of Veterans Affairs*, [113 M.S.P.R. 277](#), ¶ 14 n.6 (2010) (citing EEOC Enforcement Guidance at 19-20 (Question 27)). The record thus shows that the appellant non-frivolously alleged that there was at least one position - as a 508 Compliance Coordinator in Colorado - available during the proper time frame. If the appellant can prove his allegation regarding the medical officer's September 2009 referral of his accommodation request, he potentially could have identified a total of three positions for which he was qualified that would have been available during the relevant time frame. *See* IAF, Tab 9 at 6. Additionally, the agency identified two other Management Analyst positions for which the appellant had applied in early 2010 and had been deemed qualified. *See* IAF, Tab 10 at 7. Accordingly, the appellant non-frivolously alleged that there was a reasonable accommodation that would have allowed him to continue working during the period between the date on which he indicated to the agency that he had medical limitations and the date that he was separated.

The appellant non-frivolously alleged that the agency unjustifiably failed to offer an available accommodation.

¶22 In response to the administrative judge's jurisdictional order, the appellant asserted that he could have continued working "if he were reassigned to a job with an easier commute, productive work assignments, and non-hostile management." IAF, Tab 9 at 5; *see* IAF, Tab 5 at 1. Citing all of the appellant's medical conditions, the administrative judge concluded that the appellant had not

explained how these conditions would have been accommodated so that he could have continued working, if he could have been reassigned to a job with an easier commute, productive work assignments, and non-hostile management. ID at 6. The administrative judge found that the appellant failed to non-frivolously allege that, even if he had made a timely request for a reassignment as a reasonable accommodation, the agency's failure to reassign him would have been unjustified. *Id.* at 6-7.

¶23 The appellant, however, declared under penalty of perjury that his treating physicians advised him to request reassignment from Beltsville to Washington, D.C., which “would have reduced the stress of driving and the danger of driving while under drowsiness-inducing medication.” IAF, Tab 3 at 12. He also explained that he went on leave under the FMLA because he “could no longer safely commute to the Beltsville office.” *Id.* at 14; *cf. Atkins v. Department of Commerce*, [81 M.S.P.R. 246](#), ¶¶ 9-11 (1999) (remanding the appeal to give the appellant an additional opportunity to establish that his disability retirement was involuntary based on allegations that he applied for retirement, not because he wanted to retire, but to force the agency to reassign him to a less stressful and physically-demanding position that would not aggravate his underlying condition). Moreover, as explained above, the appellant non-frivolously alleged that he informed the agency he required an accommodation, and identified one or more positions to which he might have been reassigned that were apparently available during the applicable time frame.

¶24 The appellant argues on review that the agency failed to engage in an interactive process under the Rehabilitation Act to determine whether his condition could be accommodated, and this omission caused it to fail to provide a reasonable accommodation. PFR File, Tab 6 at 31; *see Gonzalez-Acosta*, [113 M.S.P.R. 277](#), ¶ 16 (the failure to engage in the interactive process alone does not violate the Rehabilitation Act; rather the appellant must show that this omission resulted in failure to provide reasonable accommodation). During the

interactive process, the appellant points out, the agency could have properly requested medical evidence and considered the likely effectiveness of various possible accommodations.⁵ PFR File, Tab 6 at 31.

¶25 Once an employee informs the agency that he requires an accommodation, the agency must engage in an interactive process to determine an appropriate accommodation. *Gonzalez-Acosta*, [113 M.S.P.R. 277](#), ¶ 15. Here, the record is unclear as to whether the agency ever engaged in such a process with the appellant. The appellant specifically stated under penalty of perjury that the agency did not engage in the interactive process: “At no time did management attempt to engage me in an interactive process to determine my need for the accommodation or to identify possible alternatives to it.” IAF, Tab 3 at 13. The agency claimed that the appellant “was given the opportunity to have his doctor answer questions related to his medical conditions as it [*sic*] pertains to the essential functions of his position in order to consider reasonable accommodations for him,” but he “did not provide any response to the Agency.” IAF, Tab 10 at 8-9. The agency did not, however, offer any evidence that it engaged in the interactive process, and even if it had, such evidence is not dispositive at this point. *See Pariseau*, [113 M.S.P.R. 370](#), ¶ 14 (citing *Ferdon*, 60 M.S.P.R. at 329).

¶26 We cannot know from the record before us whether the agency engaged in the interactive process during the processing of the appellant’s application for disability retirement. The agency file included the appellant’s Applicant’s Statement of Disability, Standard Form (SF) 3112A, and the agency medical officer’s approval, but it did not contain the Supervisor’s Statement. *See* IAF,

⁵ As the EEOC Enforcement Guidance explains, the exact nature of the interactive process that a request for accommodation triggers will vary between employees because the dialogue itself is intended to help the parties understand the employee’s needs and what changes to working conditions might be possible. EEOC Enforcement Guidance, Question 5.

Tab 10 at 21-24. As part of the appellant's application for disability retirement, the agency would have been required to complete the Supervisor's Statement, which among other things, would have addressed its efforts to accommodate his condition. We thus conclude that the appellant non-frivolously alleged that the agency unjustifiably failed to offer an available accommodation. Accordingly, the appellant has made a non-frivolous allegation of jurisdiction entitling him to a jurisdictional hearing under *Garcia*.

¶27 The appellant advances other arguments on review, for example, contending that the wording of the acknowledgment order did not communicate the proper burden of proof, and that the initial decision also misstates the burden of proof. PFR File, Tab 6 at 20-22. The appellant additionally argues that the initial decision misstates the accommodation process under the Rehabilitation Act. *Id.* at 23. Because we have set forth the applicable law herein, we need not address those arguments further.

ORDER

¶28 We GRANT the petition for review, VACATE the initial decision and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.